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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification	)	CC Docket No. 96-128
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.

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SUMMARY

This is the third time the Commission has considered the appropriate structure of a payphone compensation mechanism to "fairly compensate" PSPs for each and every call using their payphones. In re-formulating a plan, the Commission should step back and consider taking a new approach to payphone compensation. Providing PSPs with "fair compensation" does not require or permit the windfall they would receive pursuant to the Commission's last two orders.

In devising a payphone compensation scheme, the Commission should reject the approach suggested by the APCC and the RBOC/GTE/SNET Coalition ("Coalition"). It is neither lawful nor appropriate for the Commission to again attempt to tie the payphone compensation rate to the local coin rate. The D.C. Circuit has twice held that the Commission's attempts to use the local coin rate as a surrogate market rate for coinless calls was arbitrary and capricious. The comments submitted by the APCC and the Coalition fail to provide the Commission with a rational basis for now linking the local coin rate with a rate for coinless calls.

Although the market for local coin calls may be competitive, the competition is purely for location owners. Indeed, the uniform increase in local coin rates across the nation indicates a current lack of a competitive market for end users. Moreover, there is substantial evidence on the record that the costs for local coin calls are less than half the $.35 rate currently being charged throughout the country. Accordingly, the evidence illustrates that under present market conditions there is no relationship between the rates and costs of local coin calls.

However, the Commission can adopt a true market based compensation plan by adopting a calling party pays system. There is substantial record and industry support for calling party pays, and such a system would be the only true market based plan available to the Commission. In

addition, calling party pays is a simple solution to payphone compensation that would benefit consumers, as well as the PSPs, IXCs, and wireless carriers.

Finally, if the Commission declines to adopt a calling party pays mechanism and insists on prescribing a rate, the rate must be based on the costs of an efficient PSP. In addition to the information already submitted, which was cited by numerous commenters, the Commission should consider the new study submitted by MCI which calculates the entire cost for a PSP to provide an additional payphone. However, if the Commission prescribes a cost based rate, it must seriously evaluate the data of LECs who are the more efficient providers of payphone services, rather than rely solely on the Independents. As the comments of multiple parties suggest, any prescribed rate should be no higher than $.13.

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Excel Communications, Inc., on behalf of its operating subsidiaries, by undersigned counsel and pursuant to the Commission's Public Notice released June 19, 1998,[1/] hereby submits its Reply Comments in the above-referenced proceeding.

I INTRODUCTION

The Commission should be very skeptical of the arguments set forth by the APCC and the RBOC/GTE/SNET Payphone Coalition (the "PSPs"). By urging the Commission to again adopt a default rate for coinless calls that is tied to the local coin rate, the PSPs have ignored the D.C. Circuit's reasoning in both payphone appeals. The D.C. Circuit plainly rejected both of the Commission's previous attempts to link the default rate for access code calls and subscriber 800 calls (together referred to as "coinless calls") to the local coin rate. A third compensation scheme based on the local coin rate would likely be struck down again.

To avoid a third remand and to finally adopt a lawful compensation plan, the Commission must take a fresh look at the possibilities for payphone compensation and must reject the PSP arguments. Contrary to the PSPs' views, the Commission is only required to prescribe "fair"

1/ Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, CC Docket No. 96-128 (June 19, 1998).

compensation for PSPs. Fair compensation does not require *or permit* the windfall profits the PSPs would reap under the Commission's earlier orders. It is time for the Commission to focus on providing fair compensation to the PSPs using a creditable methodology that will be upheld on appeal.

Although the D.C. Circuit has amply demonstrated its skepticism that the local coin rate is an appropriate market surrogate for a coinless call rate, the D.C. Circuit did leave open the possibility of a "market based" rate. Accordingly, as advocated by numerous commenters, the Commission could adopt a true market based rate, namely a calling party pays compensation mechanism. The other appropriate and defensible approach available to the Commission is to finally collect and review the relevant cost data and to establish a default rate based on the costs of an efficient PSP.

II THE COMMISSION SHOULD REJECT THE PSP ARGUMENTS TO CONTINUE TO TIE THE DEFAULT RATE TO THE LOCAL COIN RATE

In an effort to save an exorbitant per-call rate that can be justified in no other way, the PSPs astoundingly argue again that the Commission should tie the default rate for coinless calls to the local coin rate, and that the D.C. Circuit did not reject this approach. APCC suggests that the court approved of the Commission's approach, but only wanted the Commission to fill in its reasoning.[2/] The RBOC/GTE/SNET Payphone Coalition ("Coalition") stated, "[t]he D.C. Circuit did not criticize and certainly did not reject the Commission's avoided cost methodology for deriving a per-call compensation rate from the deregulated local coin price."[3/] Unless the PSPs are referring to a

[2/] APCC Comments, at 2-3.

[3/] Coalition Comments, at i.

decision other than the court's May 15, 1998 order, they are engaging in a plain misreading of the court's reasoning.

Far from upholding the Commission's avoided cost methodology, the court flatly rejected such a plan barely a week after hearing oral argument. Indeed, the only reason the Court did not vacate the plan a second time was because the independent PSPs pled a current cash crisis. The Court stated: "Having examined the record thoroughly, we find the Commission's explanation of its derivation of the $.284 rate plainly inadequate."[4/] In addition, the Court aptly compared the Commission's methodology to subtracting apples from oranges. The fact that the PSPs now seek to persuade the Commission to use this flawed methodology again, only proves that their sole goal is to continue to receive windfall profits at the expense of the interexchange carriers ("IXCs") and, ultimately, consumers.

A. <u>Rates and Costs Do Not Converge in the Local Coin Market</u>

The PSPs erroneously argue that because the market for local coin calls is "competitive," rates and costs converge. This argument is fallacious for a variety of reasons. First, the PSPs point to various economic studies illustrating the competitiveness of the local coin market, including low barriers to entry, and a number of competing firms. Although the payphone market may be competitive, the PSPs fail to acknowledge the beneficiary of the competition. All evidence of payphone competition points to competition for monopoly payphone sites and *not* for end users. As noted by various commenters, several payphone owners have conceded that the reason they raised

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4/ *MCI Telecommunications Corporation, et al. v. Federal Communications Commission*, No. 97-1676, slip op. at 2. (D.C. Cir. May 15, 1998) ("*Payphone II*").

rates 40% (from $.25 to $.35) was to compete for location sites with higher commissions.[5] Indeed, the record is devoid of evidence that there is any competition among payphone providers for end users. Although the PSPs argue that in certain well populated areas, there are some payphones that are geographically in the same vicinity, the PSPs have not submitted any evidence contradicting the existence of locational monopolies.

The way the payphone market is currently structured, multiple payphone owners compete for the right to an exclusive franchise in a given location. Because there are thousands of PSPs and only a limited number of places in which to place a payphone, PSPs compete with each other for the right to the exclusive franchise. As the E Group points out in its economic study, the nature of competition in the payphone industry is more akin to competition-for-the-field than competition-within-the-field: "Payphone operators are characterized as competitors in a bidding war for the exclusive right to provide payphone service at a particular location."[6] Thus, while the PSPs may be correct in arguing that the payphone market is competitive, the competition is clearly for location, not for end users.

The fact that the payphone market is not competitive for end users is further evidenced by the almost uniform rate of $.35. If the market was fully competitive as claimed by the PSPs, one would expect that rates would be driven down as PSPs compete for the business of end users. At the very least, a competitive market would show some indicia of differing rates, for example, payphones in cities may have lower rates than payphones in rural areas because of the level of

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5/ See AT&T Comments, at 3; MCI Comments, at 2-3; Sprint Comments, at 20.

6/ *See* E Group Study, submitted as an attachment to MCI Comments, at 3-6.

competition. Instead, a flat rate of $.35 indicates a flat competitive environment. Thus, the PSPs have failed to prove that the payphone market is competitive for end users.

Next, the PSPs argue that because the payphone market is fully competitive, rates and costs converge.[7] In addition to the fact that the payphone market is not competitive for end users, the PSPs also fail to address any of the cost evidence submitted by the IXCs showing that costs for local coin call is approximately $.16. Nor did the PSPs submit any evidence showing their costs to be any different than $.16. It is insufficient to simply assert that rates and costs converge when there is substantial evidence on the record showing costs to be less than half of the local coin rate. It would be folly, therefore, for the Commission to simply accept that rates and costs for coinless calls converge, when the only hard evidence submitted on the record points to the contrary.

B. <u>An Avoided Cost Approach Is Arbitrary and Likely to be Struck Down on Appeal</u>

The PSPs argue that because the local coin market is competitive, it is appropriate to base a coinless call rate by adjusting for the differences in the variable costs of local coin calls and coinless calls.[8] However, the Court has already rejected this method and correctly likened it to subtracting apples from oranges. Even if the market for local coin calls was competitive, it is inappropriate to use that rate as a market surrogate for coinless calls, because the markets for local coin calling and coinless calling are wholly different. As explained by numerous commenters, in a coin call situation, the party paying the cost of the call is also the party making the economic decision as to whether to use the phone. In the current coinless call environment, the party paying

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7/ APCC Comments, at 14; Coalition Comments, at 13.

8/ APCC Comments, at 14-16; Coalition Comments, at 12-13.

for the use of the payphone (the IXC) has no ability to decide whether to even use the payphone to make the call. It is a third party, not directly bearing the economic burden, that makes the decision.[9] The fact that the seller in both situations is identical is irrelevant to this market analysis.

In short, the Court in *Payphone II* recognized that the Commission's avoided cost methodology was an attempt to derive a "market rate" for coinless calls, when no market rate existed.[10] The PSPs have attempted to convince the Commission that despite the Court's rejection of its first attempt, it is possible to create such a market rate. As Excel and other parties pointed out in their comments, such an attempt is so fraught with arbitrary decisions and assumptions that any "market rate" prescribed by a governmental agency is highly likely to be fatally flawed. As such, Excel urges the Commission to reject the PSPs' pleas to yet again, in the words of the Court, "construct" a market for coinless calls.[11]

III THE COMMISSION MUST TAKE A FRESH APPROACH TO PAYPHONE COMPENSATION AND SHOULD RECONSIDER A CALLER-PAYS SYSTEM

In light of both the merits and two adverse judicial decisions, the Commission should step back and consider a fresh approach to payphone compensation. The economic analysis and data supplied to the Commission by the PSPs demonstrably are not sufficient to support an avoided cost approach using the local coin rate as the market surrogate. However, the Court did indicate that a

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9/ *See* Excel Comments, at 5; AT&T Comments, at 10; Sprint Comments, at 13; LCI Comments, at 6-7; Cable and Wireless Comments, at 7.

10/ *Payphone II*, at 1.

11/ *Id.*

market-based approach in principle could be an acceptable method for determining PSP compensation. In addition, it is obvious from their comments that the PSPs prefer a market-based rate over a cost-based rate. Instead of attempting to "construct" a market, the Commission should adopt a true market rate for coinless calls by adopting a calling party pays compensation mechanism.

The record support for calling party pays as an alternative to the failed previous approach has become overwhelming outside of the PSP community.[12/] Virtually all of the IXCs and the wireless carriers have indicated support for calling party pays. More importantly, the benefits of a calling party pays approach are formidable. First, calling party pays would create a true market for end-users of payphones and would further the Commission's goals of promoting competition in the payphone industry. The calling party would have the incentive to "price shop" if the rate for subscriber 800 and access code calls at a particular phone were too high, which would consequently -and at long last--incent PSPs to compete with lower rates for such calls. Calling party pays would also be more consumer friendly than a carrier pays situation in which some carriers may block calls from payphones. A calling party pays scheme would provide the consumer with more complete information regarding the use of the payphone and would better ensure access to services available from payphones.

As outlined in Excel's initial comments, calling party pays has a number of administrative benefits as well.[13/] The Commission has certainly recognized the problems with administering a

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[12/] *See* AT&T Comments, at 13-14; Sprint Comments, at 5-15; PCIA Comments, at 7-13; Cable and Wireless Comments, at 11; WorldCom Comments, at 5-8; Airtouch Paging Comments, at 2-5.

[13/] Excel Comments, at 6.

carrier pays system. In contrast, a calling party pays system would remove many of the administrative nightmares. It is for this reason that one commenter, International Telecard Association, changed its view on calling party pays. ITA noted that while it originally believed that a carrier pays approach would provide administrative and cost efficiencies, it has "in fact proven costly, confusing and inefficient, resulting in significant dissatisfaction by both IXCs and PSPs."[14]

The calling party pays system benefits all groups affected by Section 276. It benefits the IXCs because it removes the administrative nightmare of tracking and paying thousands of PSPs for millions of payphone calls. It benefits the PSPs because it ensures they receive compensation in a timely and efficient manner--indeed, instantaneously. It benefits the Commission's objectives because it promotes the market-based policy favored by the Commission. Finally, it benefits consumers by providing more complete information and ensuring access to payphones without the possibility of blocking of 800 and 888 numbers.

In addition, a calling party pays solution is a rational approach that will assuredly be upheld by the D.C. Circuit. As noted by a number of commenters, neither the Commission's previous rejection of caller pays nor the Court's affirmance in *Payphone I* of that rejection would preclude the Commission from revisiting this issue and adopting a caller pays plan today. In *Payphone I*, the Court only determined that the Commission's decision to adopt a carrier pays plan was not arbitrary

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[14] ITA Comments, at 6. The Commission should not underestimate the significance of ITA's change in position. Debit cards are sold on the premise of customer convenience and more than 40% of debit card calls are made from a payphone. ITA's change in position demonstrates that requiring customers to deposit coins to make a payphone call will not be overly burdensome and would be more customer friendly than a carrier pays system.

and capricious.[15] The court acknowledged valid reasons for adopting either a calling party pays or a carrier pays system. Accordingly, it would also be reasonable after attempting to adopt a carrier pays plan without success for the Commission to now decide to adopt a calling party pays system.

As argued by a number of commenters, Section 226(e)(2) ("TOCSIA") is not a barrier to calling party pays. TOCSIA directs the Commission to "consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services . . ." By adopting a market based compensation scheme in which the prices for coinless calls are actually set by the market and not the Commission, the Commission would not be "prescribing compensation," and thus TOCSIA is not implicated.[16]

Similarly, the Commission should remember that Section 276 does not require the Commission to "prescribe" compensation for PSPs. The Commission only has to establish a per-call plan to ensure that all PSPs are fairly compensated for all payphone calls. The previously established rates are not fair compensation, but are windfall profits for the payphone industry subsidized by consumers. The Commission should not continue to perform a disservice to end users by attempting to determine how they would act if they had a competitive market for payphone calls. Instead, the Commission should grant them such a competitive market. Indeed, the Commission should not ignore the groundswell of support for a calling party pays system. Calling party pays is the only option that would satisfy the Commission's desire for a market based approach that is based on an actual market.

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[15] *Illinois Public Telecom. Ass'n v. FCC*, 117 F.3d 555, 566-67 (D.C. Cir. 1997) ("*Payphone I*").

[16] *See* Sprint Comments, at 8-9; PCIA Comments, at 11-12..

However, if the Commission is intent on prescribing a proxy for a market rate, instead of looking to the local coin rate, Excel agrees with AT&T and Sprint that the Commission should look to the actual negotiated rate between AT&T and the Independent Payphone Providers ("IPPs").[17] AT&T explained that negotiations between AT&T and IPPs previously resulted in an agreement that a $.25 per call rate was fair compensation for dial-around calls. At that time, such calls generated average revenue for AT&T of about $2.50, which results in approximately a 10% payment rate for use of the payphone. Currently, the average revenue for access code calls is $2.20, which applying a 10% rate would yield a rate of $.22. These calls are only about one-third of compensable calls. When a similar analysis is applied to 800 subscriber calls, the market rate is only $.05, because these calls only generate average revenues of $.50 per call. A weighted average rate for the two different calls would thus, yield a market rate of under $.11 per call.

IV THE ONLY VIABLE CARRIER-PAYS APPROACH IS ONE BASED ON COSTS OF AN EFFICIENT PAYPHONE PROVIDER

If the Commission is intent on prescribing a rate for coinless calls, the rate must be based on the costs of an efficient PSP. The Commission currently has the information in the record necessary to perform this analysis. In addition to the information already in the record, which was cited in numerous comments, MCI introduced a new study which calculates the entire cost for a PSP to provide an additional payphone.[18] The total cost of the phone is shown on a per-call basis for all calls made on the phone. In addition, the cost per call for 800 and access code calls is estimated by removing coin related costs from the average per call costs for all calls. This study shows the costs

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17/ *See* AT&T Comments, at 14-15; Sprint Comments, at 14.

18/ *See* MCI Payphone Cost Study, attached to MCI's Comments as Exhibit 2.

for all calls to be approximately $.16 for smart payphones and $.11 for semi-smart payphones. For coinless calls, the approximate cost is $.12 for smart payphones and $.08 for semi-smart payphones.

Costs of an efficient PSP in providing the service is a reasonable method of calculating a default per-call rate. To prescribe this rate, however, the Commission must seriously evaluate the data of LECs who are the more efficient providers of payphone services, rather than rely solely on the Independents, who are a minority of payphone owners, with higher costs than their LEC counterparts.

The PSP arguments against setting a cost-based rate are not unique to a cost-based approach. Indeed, many of the cited problems exist with regard to the PSP suggested approach of an invented market based rate. The PSPs claim that a cost based rate bears the difficulty of correctly assessing costs and the need to continually revisit cost determinations.[19] While true, this is neither a valid excuse for eschewing a cost-based rate nor a problem that is unique to a cost-based approach. Cost data is certainly more ascertainable than attempting to construct a market rate with no data on the market at all. At the very least, a cost based rate allows the Commission to base its decision on quantifiable data that will result in a rational rate. Moreover, as the PSPs argue it, the Commission would have to continually assess a market-based rate as well as a cost-based rate. According to the PSPs, the cost-based rate would not be workable because the cost snapshot would be a static reflection of market conditions at one particular time.[20] As market conditions changed, the snapshot-based rate would cause market distortions. Under that theory, however, any market based

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[19] APCC Comments, at 12; Coalition Comments, at 4.

[20] *See* APCC Comments, at 13.

rate would have to be continually assessed as well because of the same constantly changing conditions in the payphone market. Therefore, any prescribed Commission rate would need to be continually updated, whether it be based on the market or on costs. In fact, Excel finds it ironic that the PSPs argue that a cost based rate would be hard to quantify and likely inaccurate, while at the same time advocating a rate that is based on no quantifiable data and has been twice ruled by the D.C. Circuit to be arbitrary and capricious.

In short, as Excel stated in its initial comments, if the Commission declines to adopt a calling party pays solution, its only rational alternative is to finally take a hard look at the cost numbers and perform a detailed analysis as to the costs of coinless calls. The evidence already submitted on the record illustrates that any prescribed rate should be no more than $.13.[21]

V CONCLUSION

At this juncture in the Commission's effort to craft a rational and defensible payphone compensation scheme, it cannot return again to its twice-discredited methods. Contrary to the PSPs' contentions, the D.C. Circuit has rejected the Commission's tying of a default rate for coinless calls to the local coin rate. The PSPs have provided the Commission with no new information that would make such a decision less arbitrary. Thus, if the Commission decides to return to its previous analysis and attempts to adopt another avoided cost rate based on the local coin rate, such a rate is highly likely to be found unlawful.

Accordingly, the Commission should step back and take a fresh look at other possibilities for a payphone compensation mechanism. The Commission must recognize that the fair

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21/ *See* Excel Comments, at 9-12.

compensation required by Section 276 does not equate to the windfall the PSPs are currently receiving. A calling party pays system has received significant support throughout the industry and should be seriously considered. In the alternative, an approach based on the costs of an efficient PSP would also be lawful and an acceptable compensation method.

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Dated: July 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of July, 1998, copies of the Comments of Excel Communications, Inc. in the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-128) was hand delivered to:

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